

ESSAYS IN HONOUR
OF
MICHAEL BOGDAN

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PRIVATE INTERNATIONAL LAW IN TOTALITARIAN STATES

This essay in honour of Michael Bogdan – who is as far from an authoritarian personality or a totalitarian thinker as a professor of law can conceivably be – is intended as a historical sketch. It does not treat in detail every type of totalitarian state; much more space than that allocated to this essay, and a writer with much wider knowledge, would be required for that kind of encyclopaedic exercise. In particular, all the states considered in this essay are European states; it was not possible to consider totalitarianism in Asia, which clearly is a relevant limitation. Despite these qualifications, it is hoped that a review of the situation of societies under totalitarian rule might throw light, from an unusual angle, on the relationship (or the absence of a relationship) between the nature of a society and the private international rules adopted by its legislature or courts.

1. The criterion of totalitarianism

There is one preliminary difficulty in even starting to write about something as inconsequential (compared to the totalitarian phenomenon as a whole) as the private international law rules adopted in totalitarian states. That is the notorious absence of consensus, in political science, about what are the exact characteristics of totalitarian states, as opposed to merely authoritarian or dictatorial ones.

The absence of consensus is unsurprising. At least since the end of the Second World War, no state will proudly proclaim itself totalitarian,¹ and the

¹ This was different for Fascist Italy and Nazi Germany. See the section “Dottrina,” signed by Benito Mussolini (although said to have been at least partially ghost-written for him by Giovanni Gentile) within the article “Fascismo” (“Fascismo. – Movimento politico italiano creato da Benito Mussolini (v.)”) of the *Enciclopedia italiana*, vol. XIV (1932), p. 848: “per il fascista, tutto è nello stato, e nulla di umano o spirituale esiste, e tanto meno ha valore, fuori dello stato. In tal senso il fascismo è totalitario,” etc. Similarly in Germany, after Hitler’s rise to power: see in legal literature, by eminent specialists of public law, Carl Schmitt, *Politische Theologie*, preface to the new edition of November 1933: “Inzwischen haben wir das Politische als das Totale erkannt,” or before that in *Der Begriff des Politischen*, 1932 [8th ed., 2009, p. 23], or his aptly titled article “Totaler Feind, totaler Krieg, totaler Staat” in *Positionen und Begriffe: im Kampf mit Weimar – Genf – Versailles*, 1939, p. 240 (3rd ed. 1994, p. 268), with further references; also Ernst Forstthoff, *Der totale Staat*, 1933. Forstthoff recanted after the War, *Der Staat der Industriegesellschaft*, 1971, p. 54 and note 1.

characterisation of a state as totalitarian bears with it a considerable stigma. It can be used as an instrument of political propaganda, and will be readily used by opponents of a state, with hesitation by neutral observers, and not at all by supporters. In fact, there is only one state that everyone agrees was totalitarian: Nazi Germany. For all others, there is at least a discussion. There is doubt about Fascist Italy: its proclaimed ambitions were totalitarian, but the historical reality may well have been different; thus according to Hannah Arendt, "Mussolini, who was so fond of the term 'totalitarian state,' did not attempt to establish a full-fledged totalitarian regime and contented himself with dictatorship and one-party rule".² As for the Soviet Union and its Eastern European allies, apart from writers refusing on political grounds to characterise even the worst Stalinist period as totalitarian, there is a *bona fide* debate on whether true totalitarianism did not come to end there with Stalin's death.³ This leads, then, to the question of the nature of the "post-totalitarianism"⁴ that followed it: a dictatorship caught in a morass of bureaucratic stagnation? With partial relics of totalitarian aims and methods? (But can there be such a thing as partial totalitarianism?) Especially during the Cold War years, there was also another, much simpler view of the countries of the "Soviet bloc": they were, up to the end of communism in Europe in the 1990s, the epitome of totalitarian – as opposed to merely authoritarian – rule.⁵

These are the states study of whose private international law will be attempted here. Naturally, similar questions arise as to whether or not other states can be properly characterised as totalitarian.⁶

Totalitarianism is a complex phenomenon. One view is that of Friedrich and Brzezinski, for whom no less than six criteria have to be met for a society to be properly characterised as totalitarian: "an elaborate ideology, consisting

² *The Origins of Totalitarianism*, New York, Schocken, 2004, p. 411 (see also *ibid.*, note 12). The book was originally published in 1951; new editions have been published with amendments.

³ Supporting this view, Arendt (preceding note), pp. 389 and 403 (text written in 1967).

⁴ Iulia Motoc, "Law and Real Legitimacy in Eastern Communist Countries," in *Les doctrines internationalistes durant les années du communisme réel en Europe/Internationalist Doctrines During the Years of Real Communism in Europe* (E. Jouannet and I. Motoc, eds.), 2012, p. 25.

⁵ E.g., during the 1960s, Carl Friedrich and Zbigniew Brzezinski, *Totalitarian Dictatorship and Autocracy*, 2d ed., 1965 (paperback ed. 1966); Raymond Aron, *Démocratie et totalitarisme*, 1965. For the controversial view that "[o]nly intellectual fashion and the tyranny of Right/Left thinking prevent intelligent men of good will from perceiving the facts that traditional authoritarian governments are less repressive than revolutionary autocracies, that they are more susceptible of liberalization, and that they are more compatible with U.S. interests," see "Dictatorship and Double Standards," by Professor (as she then was) Jeane Kirkpatrick, *Commentary*, November 1979.

⁶ A list of examples (quite possibly both overinclusive and underinclusive) is suggested by Philippe Braud, *Sociologie politique*, 10th ed., 2011, p. 289 et sq.: Nazi Germany, Soviet Russia under Stalin, North Korea in (undefined) past times, China under Mao, Cambodia under Pol Pot, Iran under Khomeini and Afghanistan under the Taliban.

of an official body of doctrine covering all vital aspects of man's existence," a mass party led by a dictator, a system of terror, a technologically conditioned near-complete monopoly of all means of mass communication and central bureaucratic control and direction of the economy.⁷ Others consider the ideological aspect as the decisive distinction between totalitarian and authoritarian states: the existence of a revolutionary state ideology, "the claim transformed into political action that the world and social life are changeable without limit."⁸ Whether or not the latter definition is sufficient for all purposes, it would appear to be very meaningful for the limited purpose of defining the distinctive features of *law*, and in particular private law, in totalitarian societies. Among the fundamental features of private law are the values and policies that a given society enforces among individuals through legal process, but also the degree of autonomy (or lack thereof) of the technical and systematic aspects of private law from the values or policies promoted by that society. A totalitarian state has unequivocal political aims and seeks transformation of every aspect of social life, of which law is a part; but with private international law, we have a branch of law which has traditionally prided itself on its abstraction and its intricate techniques, and which might perhaps have been able to resist, at least to some extent, contamination by the policies of a totalitarian regime.

2. A brief look at Fascist Italy

That Mussolini's Italy was, despite his valiant rhetorical efforts to the contrary, not a truly totalitarian state appears to be corroborated by its private international law. The Italian conflict of laws rules were newly enacted in 1938, as a preliminary chapter of the new Civil Code which entered into force, as a whole, in 1942 – and could remain in force, without substantial legislative change, until their replacement by the Law on the Reform of Private International Law of 1995. The one change that was effected in 1944, after the fall of the fascist regime, was the suppression of a subsection to Article 31 of the Code which had specified that "[t]he corporative order is an integral part of public policy"; that was the one express reference to a fascist legal institution in the

⁷ *Op. cit.*, p. 22. It is doubtful, according to the authors (p. 22-23), whether administrative control of the courts is a distinctive trait as well.

⁸ *Ibid.*, p. 16, quoting Hans Buchheim (with whom Friedrich and Brzezinski do not agree). See also Julien Freund, *L'essence du politique*, 1965, p. 298-299: "un gigantesque effort pour effacer la distinction entre l'individuel et le public, par élimination de cette réalité intermédiaire entre le public et le personnel qu'est la société civile," and further on the essence of totalitarianism Gerhard Leibholz, *Die Auflösung der liberalen Demokratie in Deutschland und das autoritäre Staatsbild*, 1933, p. 68-69 (a short book published in Germany just before his emigration).

Disposizioni sulla legge in generale pertaining to private international law in the Civil Code of 1942.⁹

The promoters of the 1938/1942 reform of Italian conflicts law clearly valued fidelity to classical doctrine rather than fascist posturing or ruthless pragmatism.¹⁰ The same seems to have been true of the case law of the Italian courts.¹¹ There was one area of the law, it is true, where the “corporatist” nature of the economy under fascism, the collective organisation of workers and employers under state supervision, did at least superficially play a significant role in Italian case law on private international law matters. This was the development of the protection of workers by overriding mandatory provisions of law, a question with which courts and authors were struggling in the 1930s in Italy and elsewhere.¹² The Italian courts were the first to resolve this question by unambiguously stating that the protection of the provisions of Italian labour law was applicable to every worker habitually employed in Italy, whether by a foreign or an Italian employer and independently of the law normally applicable to the labour contract. This was justified by the idea that under the corporatist Charter of Labour, labour was no longer looked upon as a matter of private contract, but as an essential instrument of national power,¹³ and that “within the institutions built by the fascist state, the fundamental principle that labour has a social function has been realized to the fullest extent”.¹⁴

However, the “social function” of labour law, which translates itself into the protection of workers’ rights,¹⁵ can also be considered independently from a fascist organisation of the national economy. This explains that the Italian courts continued seamlessly, after the end of the fascist regime, to rely on the essential holdings of that jurisprudence, simply leaving aside the reference to

⁹ A reference which was possibly inspired by the jurisprudence of the *Corte di cassazione*, see below text at notes 13 and 14. The subsection had been added in 1942, at the moment of the enactment of the Civil Code as a whole.

¹⁰ Paul Heinrich Neuhaus, “Das internationale Privatrecht im italienischen Zivilgesetzbuch von 1942,” *RabelsZ* 1949/50, p. 22, 32.

¹¹ One disclaimer applies here: the statement in the text is based not on an independent search of the law reports, but on the thorough review of Italian case law by Rodolfo De Nova, “La jurisprudence italienne en matière de conflits de lois de 1935 à 1949,” *Rev. crit.* 1950, p. 159 and p. 321.

¹² See Henri Batiffol, *Les conflits de lois en matière de contrats*, 1938, pp. 262-273, for references (Italy: p. 269); or the homage to Italian case law at the time of the “institutions nouvelles” by the eminent (and decidedly right-wing) French conflicts lawyer Jean-Paulin Niboyet, *Traité de droit international privé français*, vol. V, 1948, p. 65, note 1.

¹³ Cass. 28 July 1934, *Foro it.* 1934, I, 1824.

¹⁴ Cass. 19 May 1939, *Foro it.* 1939, I, 1399.

¹⁵ *Ibid.* col. 1401, referring to “[l]a legislazione fascista che, ponendosi all’avanguardia dell’evoluzione mondiale nell’ordinamento di questa materia, ha realizzato con più vaste discipline, i più ampi diritti dei lavoratori.”

corporatism and fascism,¹⁶ as if that had been nothing more than yet another rhetorical device. Today, the solutions derived in the 1930s from the Charter of Labour appear as a wholly unexceptional part of the protection of the worker as the weaker party to the labour agreement.

3. Conflicts law in National Socialist Germany¹⁷

National Socialism had a profound effect on German law, including private law,¹⁸ but there was to be no Nazi “conflicts revolution.”

a) Legislation

A number of provisions on private international law were enacted after 1933, some of them on subjects unrelated to the National Socialist ideology,¹⁹ some of them as accompanying measures to decidedly Nazi laws. The notorious *Blutschutzgesetz* (“*Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre*”) enacted in Nuremberg in 1935, which shocked the legal conscience of the world by forbidding marriage between “Aryans” and “non-Aryans,” contained specific provisions on private international law. These, however, were not imperialistic, unilateral conflict rules.²⁰ On the contrary, the *conflicts* provisions of the *Blutschutzgesetz* were more restrained than the usual conflict rules of

¹⁶ See the cases from the post-war period cited by De Nova (note 11), p. 357.

¹⁷ This aspect of Nazi law has been the object of helpful studies by the Hamburg Max-Planck-Institute in the 1970s: see the doctoral dissertations by Rudolf Ulrich Külper, *Die Gesetzgebung zum deutschen Internationalen Privatrecht im “Dritten Reich”*, 1976 and Bernhard Raiser, *Die Rechtsprechung zum deutschen internationalen Eherecht im “Dritten Reich”*, 1980. Külper and Raiser had collaborated on the two volumes of documentation on case law from 1935 to 1944 published in 1980 in the *IPRspr.* series and comprising 832 cases, *Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts in den Jahren 1935 bis 1944*. A few of these cases have a specifically National Socialist content.

¹⁸ Michael Stolleis, *Recht im Unrecht*, 1994; Bernd Rüthers, *Die unbegrenzte Auslegung*, 6th edn., 2005. On the “obliteration by political purposiveness” of the distinction between public and private law under National Socialism, see already Karl Loewenstein, “Law in the Third Reich,” 45 *Yale L.J.* 779, 780 (1936).

¹⁹ The most important of these was the *Verordnung des Ministerrats für die Reichsverteidigung* of 7 December 1942. Unrelated to Nazi ideology, but directly related to the German military operations and conquests during the Second World War, it provided for an exception to the reference to *lex loci delicti* in the case of torts among Germans abroad. It remained in force after the War (see commentary by Karl Kreuzer in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. 10, 3rd ed., 1998, p. 2011–2012) and is among the indirect predecessors of Art. 4(2) of the Rome II Regulation (No. 864/2007) on the law applicable to non-contractual obligations.

²⁰ A fact on which much stress is laid in a cynical speech by Carl Schmitt to the German national branch of the International Law Association, published as “Die nationalsozialistische Gesetzgebung und der Vorbehalt des ‘ordre public’ im Internationalen Privatrecht,” *ZAKdR* 1936, p. 204 (see p. 208: “wesentlich defensive[r] Charakter unserer Gesetzgebung,” or p. 211: “Die nationalsozialistische Gesetzgebung hat Sinn für Grenzen, auch für die eigenen Grenzen bewiesen, und daher auch Sinn für Gerechtigkeit”).

German law: the law applied to the marriage of German “Aryans” only, and while it declared marriages void if they had been entered into in Germany in contravention of the law’s prohibitions, such marriages, if entered into abroad, were declared void only if the spouses had married abroad with fraudulent intent. Similarly, the eugenic marriage law of Germany (*Ehegesundheitsgesetz* of 1935) specified that it did not apply if both spouses, or even only the husband, possessed a foreign nationality. The rationale behind this restraint was a matter of foreign policy: it did not seem expedient to create diplomatic incidents by applying the *Blutschutzgesetz* to marriages less closely linked to Germany.²¹ Other – again foreign policy motivated – restrictions on the international operation of the Nazi racial laws were the effect not of legislation, but of the Nazi *Maßnahmenstaat*:²² when in 1943, during the war-time occupation of Alsace, the President of the District court in Strasbourg asked the Minister of Justice in Berlin for directives on how to handle claims for annulment of marriages between German or Alsatian women and their Arab husbands, the minister replied that “annulment by German courts of marriages to Arabs on ground of their race is for the moment considered undesirable for foreign policy reasons.”²³

b) Authors

Many German private international law scholars, subjected to persecution, left Germany.²⁴ In-depth discussion of the novel private international law questions as arose out of National Socialism were left to new, ideologically reliable, men.²⁵

²¹ See Külper (note 17), p. 262. Similarly, there seems to have been a consensus not to apply the *Blutschutzgesetz* by *renvoi* in the case of the marriage of an “Aryan” foreigner, e.g. a Dane, whose national conflict rule would have referred back to German law as the law of the domicile (*ibid.*, p. 71).

²² This concept was developed by Ernst Fraenkel in his work *The Dual State. A Contribution to the Theory of Dictatorship*, 1940.

²³ Külper, p. 262, quoting from archival material.

²⁴ See the impressive series of biographies of emigrants to the United States in Ernst C. Stiefel and Frank Mecklenburg, *Deutsche Juristen im amerikanischen Exil (1933-1950)*, 1991, and to England in *Jurists Uprooted. German-speaking émigré lawyers in Twentieth Century Britain* (Jack Beatson and Reinhard Zimmermann, eds.), 2004. See also Kurt Siehr, “German Jewish Scholars of Private International Law and Comparative Law – Especially Ernst Frankenstein and His Research,” *Mélanges Fritz Sturm*, 1999, p. 1671; Kyle Graham, “The Refugee Jurist and American Law Schools,” 50 *Am. J. Comp. L.* 777 (2002).

²⁵ The one established private international specialist remaining in Germany was Leo Raape (signing the first two editions of his *Deutsches internationales Privatrecht* as “Mitglied der Akademie für deutsches Recht”: 1st ed. 1938/1939, 2nd ed. 1945; four more editions after the War; but this very learned book, while containing a number of dispassionate references to the *Blutschutzgesetz* and to other concepts of the law of its time, is entirely free from Nazi jargon). In contrast, Wilhelm Wengler was a non-conformist, see Andreas Zimmermann, “Rechtswissenschaft in Zeiten von Diktatur und Demokratie am Beispiel Wilhelm Wengler,” *Gedächtnisschrift für Jörn Eckert*, 2008, p. 1005.

Besides studying the conflict of laws provisions of new legislative enactments, in particular the *Blutschutzgesetz*,²⁶ they had to address the most pressing question of private international law in National Socialist Germany: given the new and highly politicised orientation of German private law, in particular family law, was it still considered expedient to have that law apply to all persons of German nationality and only to those? In light of the purpose of the substantive norms of family law, it might seem preferable to change the connecting factor from nationality to *Volkszugehörigkeit*, and to declare applicable the law of the *völkisch*²⁷ community to which an individual belonged. Applied to German law, this would exclude certain individuals of German nationality who were considered alien to the German *Volksgemeinschaft* (in particular persons of Jewish or Slavonic descent), but it would include others who were, say, of Polish nationality but were considered as ethnically German, *Volksdeutsche*. For the writers who gave serious consideration to this substitution, it was clear that it corresponded best to the spirit of the new private law of Germany, but also that it raised obvious foreign policy concerns: it was bound to give rise to objections by the foreign states of whom a national – or many nationals – would be treated as *Volksdeutsche* and assimilated to Germans by German law. All the writers agreed, some of them with regret, that those concerns prevented a turning away from the nationality principle in international family law.²⁸

A possible, albeit partial, solution to the dilemma of defining the applicability of National Socialist private law lay not in redefining the conflict rules, but in defining rules of self-limitation as part of German substantive law. This would allow the link between *Volkszugehörigkeit* and the applicability of German law to be set down while minimising the risk of offending foreign states. That was the approach of the *Akademie für deutsches Recht* in the preparation of a new Civil Code, the *Volksgesetzbuch* that was intended to replace the *Bürgerliches Gesetzbuch* by a private law defined by new, *völkisch* concepts. The third part of the Fundamental Principles of that draft code was titled “Scope of application of the *Volksgesetzbuch*.” Within that part,

²⁶ See, among others, Maßfeller, “Das Reichsbürgergesetz und das Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre,” JW 1935, p. 3417; George Löning, „Deutsches Rasseschutzgesetz und Internationales Privatrecht,” ZAkDR 1936, p. 299 and the dissertation by Joachim Behn, *Auswirkungen der Rasseschutzgesetzgebung auf das zwischenstaatliche Recht*, Greifswald, 1936.

²⁷ In the parlance of the new German state, *völkisch* was a term permeated with National Socialist political romanticism. It cannot be adequately translated either as “national” or as “popular.”

²⁸ Horst Müller, “Gedanken zur Neugestaltung des Internationalen Privatrechts,” DJZ 1936, p. 1067; Fritz Reu, *Anwendung fremden Rechts*. Eine Einführung, 1938, pp. 12–15 and “Zum Neubau des Internationalen Privatrechts,” DR 1939, p. 228; see already Wolgast, “Nationalsozialismus und internationales Recht,” a speech held in 1933 and published in DR 1934, p. 196, warning against the “Bismarckian” idea of excessive extension of the international applicability of German law.

Principle 25 provided, substantially in conformity with orthodox conflicts principles, that “the *Volksgesetzbuch* applies to foreigners in conformity with the rules of interstate law recognised by the *Großdeutsches Reich*.” But a rule of self-limitation was formulated by Principle 24: for German nationals “of alien blood,” provisions “which according to their purpose are intended only for nationals of German blood do not apply.”²⁹ But again, this was a provision of substantive law, not of private international law.

In 1942, the highest-ranking German government jurist, Professor Franz Schlegelberger, at the time provisional *Reich* Minister of Justice,³⁰ published an article, “Wege und Ziele des deutschen internationalen, interterritorialen und interpersonalen Familienrechts” in the *Zeitschrift für ausländisches und internationales Privatrecht*. In this he explained that “after the war will have ended victoriously”, German jurists would be called upon as architects of the new legal order of Europe to define three areas of conflicts law: first, private international law rules, which would remain substantially unchanged; second, a temporary interlocal law as the German *Reich*’s expansion could not immediately lead to a uniform law; third and most importantly, a system of permanent rules of interpersonal law, not dissimilar to the rules of colonial law: every inhabitant of the *Reich* was to be governed by the law of his or her *Volkzugehörigkeit*, to be defined under the control of the German courts and, at a later stage, to be codified.³¹ Being predicated on a victorious war, Schlegelberger’s programme remained a Nazi fantasy.

c) Cases

Finally, there is the case law of the German courts. It has been demonstrated³² that the private law jurisprudence of the era was not as apolitical as German jurists liked to describe it in the immediate post-war years, that change of the legal system in conformity with National Socialist ideas could and did happen through (re-)interpretation of pre-existing legal norms, and in particular that the value-laden “general clauses” of private law were easily reinterpreted

²⁹ “Das Volksgesetzbuch gilt für alle Angehörigen des Großdeutschen Reiches. Für Reichsangehörige artfremden Blutes gelten die Bestimmungen nicht, die nach ihrem Zweck nur für Reichsangehörige deutschen Blutes bestimmt sind”: *Arbeitsberichte der Akademie für deutsches Recht*, No. 22, 1942. A commentary explained that the members of the Academy had seen the issue of declaring the *Volksgesetzbuch* applicable to *Volkssdeutsche* of foreign nationality, but had not wished to resolve this political question (“Doch muß diese Frage der politischen Zuständigkeit überlassen bleiben”: p. 46).

³⁰ Schlegelberger was also to be the highest-ranking defendant at the so-called Justice (or Judges’) Trial in Nuremberg in 1947.

³¹ ZAIP 1942, in particular (for the interpersonal conflicts rules) pp. 12-17.

³² That demonstration is the subject of Rüthers’ habilitation thesis, cited above (note 18).

in light of the values of the new regime. Some – but not all – of the private international cases decided during the Nazi era bear this out.

Should the applicability of German law be extended – without a basis in statutory conflicts law – to *Volksdeutsche* of foreign nationality? One lower court thought so and justified its position in outright propagandist terms,³³ but most courts disagreed.³⁴ The *Blutschutzgesetz* was diligently applied, with a marked tendency to hold, as a matter of factual assessment, that a marriage contravening the law's prohibitions and entered into abroad had been celebrated abroad with the intent to circumvent the law.³⁵ More generally, it was not untypical for factual assessments to be used, in international cases as well as in internal ones, in an openly anti-Semitic manner.³⁶

But the clearest incidence of the Nazi ideology in private international law jurisprudence was, predictably, its influence on the great “general clause” of conflicts law, the public policy exception.³⁷ There it was held by the *Reichsgericht* that the prohibition of marriages among Christians and non-Christians (§ 64 of the Austrian ABGB) could not be considered contrary to public policy, especially “in consideration of the views ruling today's Germany and expressed in particular in the *Blutschutzgesetz*,”³⁸ or (by a court in Halle, but *not* by the *Reichsgericht*) that the “factual” marriages of Soviet Russia were the

³³ AG Bremen 3 September 1941, IPRspr. 1935-1944, No. 350: “Die Kindesmutter und der Kl. waren von je her Volksdeutsche, der Bekl. Reichsdeutscher. Die Kindesmutter und der Kl. besitzen, wie gesagt, seit November 1939 ebenfalls die deutsche Reichsangehörigkeit. Alle drei Beteiligten wohnen, nachdem das frühere Lodsch als Litzmannstadt Bestandteil des Großdeutschen Reiches geworden ist, auf deutschem Boden. Unter diesen Umständen würde es deutschem Rechtsempfinden geradezu ins Gesicht schlagen, wenn man im vorliegenden Falle polnisches Recht, d.h. das Recht eines untergegangenen Staates, noch dazu eines Staates, der von je her das Deutschtum auf das schärfste bekämpft hat, anwenden wollte“.

³⁴ OLG Naumburg 20 April 1937, confirmed by RG 18 November 1937, IPRspr. 1935-1944, No. 181 (both judgments are, apart from the holding of the OLG on private international law, racially inspired); cf. the reasoning of OLG Hamburg 26 February 1942, *ibid.*, No. 19, which is both very *völkisch* and nonetheless orthodox from a conflict of laws perspective.

³⁵ KG 11 October 1937, IPRspr. 1935-1944, No. 15; RG 5 December 1940, *ibid.*, No. 201; RG 5 November 1942, *ibid.*, No. 20.

³⁶ A grotesque example is KG 31 March 1941, IPRspr. 1935-1944, No. 601, in the assessment of the domicile of an emigrated Jew: “Bei einer Auswanderung von Juden aus Deutschland nach London kann nicht ohne weiteres angenommen werden, daß sie dort einen so festen Wohnsitz begründen wollten, wie es das englische Recht als Voraussetzung für das domicile of choice fordert. Denn erfahrungsgemäß war London oder Paris für diese Leute der zunächst aufgesuchte Ort, um von hier aus weiter ihre Netze auszuwerfen und sich dann dorthin zu begeben, wo ihnen die leichtesten und bequemsten Verdienstmöglichkeiten winkten.”

³⁷ This had been predicted by Wolgast (note 28) in his 1933 speech: DR 1934, p. 200. See also OLG Hamburg 26 February 1942, IPRspr. 1935-1944, No. 19, which defines public policy in *völkisch* terms.

³⁸ RG 10 October 1935, IPRspr. 1935-1944, No. 11. The holding on public policy is substantially in line with an earlier case of the Court from Weimar times: RG 16 May 1931, RGZ 132, 146.

product of a “Jewish-Bolshevik” spirit repugnant to German public policy.³⁹ Since Nazism was, in economic terms, a communitarian ideology, a number of decisions also held – less objectionably in terms of the substance of their holding, but with reference to National Socialist rhetoric – that it was for *völkisch* reasons that certain concepts of the German law of contract were to be seen as resistant, on public policy grounds, to the less socially inspired concepts of foreign contract laws.⁴⁰

4. Soviet private international law

This section will attempt to look at the law of the USSR. It does not have pretensions at scientific precision, nor does the author pretend to know Russian; it was necessary therefore to rely on such translations of treatises on private international law into Western languages as were published during the Soviet years⁴¹ and on secondary sources. Unfortunately, there seem to have been no full translations of books before the end of the 1950s, so that the Stalinist period in particular will remain in a kind of (at least metaphorically befitting) semi-darkness.⁴²

A first characteristic not necessarily of “Soviet private international law,” but certainly of the Soviet text books, is this: a tendency to cite as authority purely political statements by Lenin or Stalin, later by Khrushchev or by various Congresses of the Communist Party of the Soviet Union. None of these had any kind of legal content; they express general policies or contain general statements about the relationship between the Soviet Union and bourgeois states, in terms stressing the international dimensions of class struggle, or (in later years) peaceful coexistence and peaceful competition between socialism

³⁹ LG Halle 7 December 1935, IPRspr. 1935-1944, No. 172. But see on the same subject RG 7 April 1938, *ibid.*, No. 189, a very learned judgment.

⁴⁰ OLG Munich 2 February 1938, IPRspr. 1935-1944, No. 56; OLG Danzig 13 June 1942, IPRspr. 1935-1944, No. 650.

⁴¹ The first treatise to be thus published (in a German translation published by VEB Deutscher Zentralverlag in East Berlin) is L.A. Lunz' valuable *Internationales Privatrecht* (vol. I, 1961; vol. II, 1964). Further: I.S. Pereterski and S.B. Krylov, *Lehrbuch des internationalen Privatrechts*, 1962; M.M. Boguslavskii, *Private International Law: The Soviet Approach*, 1988.

⁴² For that period, a few secondary sources published in the West are all that could be used for this essay. They do not paint a uniform picture. For instance, there was a first edition of Lunz' textbook published in Russian in 1949, at the height of post-war Stalinism: was it a book throwing “some interesting light, mostly on the negative side, on conflict of laws from the Russian viewpoint” (A.K.R. Kiralfy, “A Soviet Approach to Private International Law” (1951) 4 Int. L.Q. 120), “an unusual mixture of political propaganda and genuine learning” (Alfred Drucker, “Soviet Views on Private International Law” (1955) 4 I.C.L.Q. 884, 887), or rather an “ouvrage bien connu” similar to the later edition (*supra*, preceding footnote) published under Khrushchev (Henri Batiffol, book review, *Rev. crit.* 1964, p. 838)?

and capitalism. It does seem clear that the choice of an author, writing under the conditions prevailing in the Soviet Union, to rely on policy statements of this kind is more likely to result from caution than from a deeply seated ideological commitment to the aims pursued by the Central Committee.⁴³ There is a profound difference between the Soviet writers on private international law and, say, a Vyschinsky.⁴⁴

A second characteristic, which sets Soviet private international law apart from most modern conceptions of private international law in the West, is the tendency to stress its link to public international law concepts. This, it is true, was an area of relative pluralism in legal doctrine in the Soviet Union, with certain authors (in particular public international lawyers like Krylov) defending the idea that private international law is governed by public international law principles and others considering it as belonging to private law.⁴⁵ But at any rate the practice of the Soviet Union emphasised the importance of considerations of reciprocity, even of retortion where needed and showed that considerations of foreign affairs were not considered alien to the treatment of private international law matters.⁴⁶ What was of special importance was to secure equality of treatment of socialist property with capitalist property by the recognition abroad of nationalisations and of the legal capacity of socialist enterprises.

Third, there was the tendency in Soviet private international law to apply the *lex fori* and not the national law or the law of the domicile to many aspects of the personal status of foreigners in the Soviet Union – their marriage, divorce or filiation –, a tendency frequently criticised, in the 1930s and 1940s, by Western conflicts specialists and said to be a side effect of communism. In fact, while a tendency to favour application of the *lex fori* may indeed correspond in theory to totalitarian thinking, it would be wrong to consider that specific feature of Soviet private international law in the family law field

⁴³ A psychological factor totally overlooked by F.A. Mann in a Cold-War-inspired review of the translation of the textbook by Lunz (note 41), (1962) 11 I.C.L.Q. 305. Other reviewers had more of a sense of mercy or humour and recognised the value of the book despite its occasional rhetoric: Hans Baade, 11 Am. J. Comp. L. 464 (1962), Albert Ehrenzweig, 57 A.J.I.L. 685 (1963) or Henri Batiffol, Rev. crit. 1964, p. 838 (see also his reviews of later works by Lunz, whom he obviously held in high regard: Rev. crit. 1974, p. 868; 1976, p. 254; 1977, p. 443.).

⁴⁴ Cf. Andrei Vyschinsky (ed.), *The Law of the Soviet State*, 1948 (English transl., N.Y., Macmillan).

⁴⁵ See the various authors cited by Pereterski and Krylov (note 41), pp. 3-4.

⁴⁶ Lunz, in particular vol. I, pp. 26-27 and 240-241; vol. II, pp. 16-19 (stressing that retortion cannot concern the operation of conflict rules as such, and that it is a matter not for the courts, but for the government); see also, by a distinguished Hungarian author, the description of the principles of the "new socialist private international law" based on the Soviet doctrines: Stephen Szász, "Private International Law in Socialist Countries," *Recueil des cours*, vol. 127 (1969), p. 178-179. It may be thought that relics of the Soviet emphasis on reciprocity remain in Russian private international law to this day.

as typically totalitarian; if that were the case, the same totalitarian features would be present in many national, including Western, conflict of laws rules and codifications.⁴⁷ Another argument to the contrary lay in the fact that the *lex-forism* of the international family law of the Soviet Union was by no means systematically imitated by the other states of the Eastern bloc: it was not, for instance, a feature of Czechoslovak or Hungarian private international law,⁴⁸ or of the conflict rules of East Germany.⁴⁹

Fourth and perhaps most characteristically, the traditional concepts of private international law were maintained, with very few originalities as compared to Western conflicts thinking. Even the structure of the public policy exception was entirely in conformity with traditional thinking; what was original was the content of Soviet public policy. This is well illustrated by an extract from one the first treatises on Soviet private international law, published by I.S. Pereterski in 1925:⁵⁰ “By virtue of the public policy of the RSFSR, the application of foreign law cannot be authorised if it results in the weakening of the dictatorship of the proletariat, in the violation of the economic system of the RSFSR, in the exploitation of man by man, or where the foreign law is based on inequality of races or nationalities, or on considerations of religion, and where the foreign law creates rights in contradiction with their social and economic purpose.” The application of such foreign laws was, in Pereterski’s opinion, a counter-revolutionary act punishable in accordance with the Criminal Code.

In a retrospective account of conflict of laws rules in the former socialist states of Europe, Petar Šarčević writes that “[d]espite the powerful influence of politics and ideology on all spheres of life, conflicts scholars were under considerably less ideological pressure than their colleagues in other fields of law,” and that “the modernization of [the post-war conflict laws of the socialist states] was up to the standards of the time they were drafted. Although their goal was ideological, the codes were free of ideology.”⁵¹

⁴⁷ Cf. Lunz, vol. I, p. 144, citing in particular American private international law.

⁴⁸ Lunz, vol. II, p. 210 explains that both the Soviet “territorialist” approach – also followed in Bulgaria – and the traditional approach as followed in Czechoslovakia and Hungary can lead to equivalent results for citizens of bourgeois states; courts in the socialist states using nationality as a connecting factor simply had to resort frequently to public policy to displace “typical elements of bourgeois family law” such as racial or religious impediments to marriage and inequality of men and women in the effects of marriage.

⁴⁹ §§ 18, 20 or 22 *Rechtsanwendungsgesetz* of 5 December 1975. However § 20(1), second sentence did provide for application of the law of the GDR to all divorces of couples of mixed nationality.

⁵⁰ The extract is quoted by Arsène Stoupnitsky, article “Droit international privé soviétique” in Lapradelle and Niboyet’s *Répertoire de droit international*, vol. VII (1930), p. 111.

⁵¹ “Die Modernisierung des Internationalen Privatrechts in der Zeit nach dem Zweiten Weltkrieg,” in *Perspektiven des Internationalen Privatrechts nach dem Ende der Spaltung Europas* (C. von Bar, ed.), 1993, pp. 14 and 25.

5. Conclusion

Review of the private international law of three now-defunct totalitarian, quasi-totalitarian or post-totalitarian European regimes shows two things.

The nature of the societies under totalitarian rule did have an influence even on private international law: the racial and eugenic laws of National Socialist Germany contained provisions on their international efficiency, and the spirit of the racial laws was perceptible in much of the private international law cases involving Jews. There were some incidences of the Nazi *Maßnahmenstaat* in Germany; an emphasis on reciprocity and the possibility of retortion in the Soviet Union; in both states a redefinition of the substantive content of public policy; and much rhetoric. All in all though, it is the survival of the techniques of private international law in these states that is striking. These techniques were not abolished, nor did they end up being replaced, in any one of the regimes, by systematic application of the *lex fori*, by conflict rules using as connecting factors *völkisch* or racial characteristics in Nazi Germany, or more simply by arbitrariness. The civilising value of private international law could not be totally suppressed, even in totalitarian states.

